

THE STATE,)
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-vs-)
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HENRY D. CARPENDER,)
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THE STATE,)
:
-vs-)
:
WILLIAM STEVENS.)
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Continuation of testimony in the above entitled matter, taken before HON. FRANK L. CLEARY, Judge, at the Somerset County Court House, Somerville, New Jersey, on Thursday, the 19th day of August, A. D. 1926, at half-past ten o'clock in the forenoon.

A p p e a r a n c e s:

ALEXANDER SIMPSON, Esq., Special Prosecutor
FRANCIS L. BERGEN, Esq., Prosecutor of Please.

Representing the State.

ROBERT H. McCARTER, Esq.,
TIMOTHY N. PFEIFFER, Esq., (Of the New York Bar)
NATHANIEL J. PALZER, Esq., (Of the New York Bar)
CLARENCE E. CASE, Esq.,

Attorneys for the Defendants.

J O H N L. D A Y - recalled on behalf of the State

DIRECT EXAMINATION BY MR. SIMPSON:

Q. Yesterday you said you didn't know whether you had these plates of photographs or not on cross examination. Did you go back and make a search to see whether you had them or not ?

A. I did.

Q. Where did you search ?

A. I searched my files at the office and also at home.

Q. Did you search every place where you were in the habit of keeping these plates and photographs for the police, or where they might possibly be ?

A. Yes, sir.

Q. Did you find them ?

A. No, sir.

Q. What do you say about them now, have you got them or haven't you got them ?

A. I haven't got them.

MR. SIMPSON: That is all.

CROSS EXAMINATION BY MR. PFEIFFER:

Q. You are referring both to the positive pictures and to the negative plates ?

A. Yes, sir.

Q. You haven't got either one of them ?

A. No, sir.

MR. PFEIFFER: Thank you. That is all.

MR. SIMPSON: That is all the evidence I care

t to submit at this time. I have other evidence,

very important evidence, that came to me last night, but it has got to be corroborated first. If it is corroborated I will submit it to the Grand Jury, but I think -- I have no doubt at all -- that I have made out a prima facie case to hold these men for murder, and therefore I won't put in any more evidence.

THE COURT: Then I understand the case is over?

MR. SIMPSON: As far as I am concerned my evidence is all in. I applied to your Honor as a sitting magistrate to conduct a preliminary examination. You have heard all the testimony. I have other testimony which I don't think in the interest of the public should be now made public. Therefore that is all the testimony I care to submit.

MR. McCARTER: If your Honor please, my associates and I have given minute examination to the statute under which these proceedings were taken and have had several hours full conference upon the subject, and have reached the conclusion, much to our chagrin and regret, that under the statute the defense has no right to offer any evidence here ---

SENATOR SIMPSON: Wait a minute here now.

MR. McCARTER: I beg pardon ?

SENATOR SIMPSON: Pardon me. Someone was talking to me and I wanted to listen to you, so I asked

him to wait a minute so I could hear you.

MR. McCARTER: And that your Honor has no discretion in your action. If I may be permitted to get the statute I would like ---

THE COURT: That is all right, Mr. McCarter. I am perfectly willing to hear you on the statute but I am satisfied that is the situation. As I read the statute, I take it that the committing magistrate himself might, if he required, for the purpose of satisfying himself, might call any witnesses that he might desire, whether they are for the State or otherwise, but I take it, from reading of the statute, that it is an ex party matter, as it were, and that the defense has no right to call witnesses.

MR. McCARTER: Yes, and as we read the statute we were further forced to the conclusion that the committing magistrate, which in this case is your Honor, has no discretion but to commit the accused who were arrested by the warrant, after having heard the evidence that was produced, to await the action of the Grand Jury. Now, naturally, under those circumstances therefore, there is nothing for us to do except to bow to the positive statements of the statute and submit to the provisions that your

Honor must commit, and the defense has no right to offer evidence in these proceedings. We had also intended, even if your Honor should determine to commit, on the assumption that your Honor had discretion, which we now conclude that your Honor has not, to apply to your Honor for bail, but careful reading of the same statute, another section, satisfied us that your Honor can only admit accused for bail in cases that are triable before your Honor, and as the charge here is murder, your Honor does not, I believe, have jurisdiction of that, and therefore apparently your Honor's hands are tied in that respect. Now, this, of course, is a matter of great regret and chagrin to us because we had hoped to offer evidence which we hoped would satisfy your Honor, and the community, and the public, which is listening with such avidity, and the newspaper reporters, that these accused are not guilty, but the statute is obdurate and the defense is helpless, and therefore all we can say is that we are very grateful to the Court for the courteous treatment that we have been accorded in being permitted to be here and listen to the evidence.

MR. SIMPSON: If your Honor please, I might say, for fear of wrong impression getting out, that

your Honor's hands are not tied, that you, if you have taken this evidence into consideration and you say there is no prima facia case, then your Honor's hands are not tied, because you can dismiss the complaint and discharge the defendants. I don't want the impression made that your Honor is a mere automaton and cannot read the evidence or consider it. If after careful consideration of the evidence your Honor says that no prove is made, you, of course, would discharge the defendants. I know the practice has been, and I think Bishop is the authority for the statement, that in an examination of this kind the defendants have no right to be sworn, but they have a right, if they so desire, to make a voluntary statement not under oath.

MR. McCARTER: I don't care what Mr. Bishop says. I supposed we are more governed by the provisions of the statute, and the statute is quite plain. "Every such judge and magistrate" --- I am reading the 17th section of our Criminal Procedure Act --- before whom any person shall be brought for treason," and other crimes, murder being among them, "shall, when in his judgment the ends of justice so require, before he commit or send the accused to prison, take, in writing, the examination of the accused, and information of those who bring him,

of the facts and circumstances thereof; which said examination and information shall be signed by such informant, and by the judge or magistrate before whom the same shall be taken; and also by the accused, if he shall be willing to sign the same; and the said judge or magistrate shall forthwith deliver or transmit the said examination and information to the clerk of the court, in which such accused is or ought to be tried for such offense; and every such judge or magistrate is hereby authorized and required to bind, by recognizance, the witnesses produced by the complainant, so that they shall present the case to the Grand Jury that next assembles." Now, there isn't a word in ~~there~~ that indicates that your Honor has any discretion at all. Before committment you can hear the evidence, and the only provision that there exists in the statute is that the examination, if taken by your Honor, shall be submitted to the clerk for the grand jury when the grand jury convenes. That is our understanding of the statute.

THE COURT: What is your understanding of the requirement of the statute permitting an investigation of this kind and for what purpose, Mr. McCarter, other than than if the committing magistrate hasn't any discretion to pass upon whether or not a prima

facia case has been made out, then what is the purpose of the statute which provides for such examination, in your judgment ?

MR. McCARTER: I think that the purpose -- I can only judge from what the statute says -- "Every such judge before whom any such person shall be brought, when in his judgment the ends of justice require, before he commit or send the accused to prison, take, in writing, the examination of the accused and information of those who bring him, of the facts and circumstances thereof; which said examination and information shall be signed by the informant and sent up to the grand jury." My thought is, that much to my surprise there isn't any that you can release, provision, that you can hear any evidence for the defense, that you can do anything except commit, and I suppose, if the case be one of sufficient importance, have the evidence there in black and white and to be followed by recognizance that the people who shall have given this evidence shall be on hand to present it to the grand jury. It is a way of finding out what the witnesses say and what they will swear to, and then goes to the grand jury, and it is to be accompanied by, if your Honor desires, a recognizance that they would have testified, that

they will appear, otherwise there is no guarantee that the prosecution commenced in that way shall be finished.

MR. SIMPSON: Your Honor, it is perfectly plain that all over the State of New Jersey committing magistrates are discharging persons accused of crime because there is no prima facie case has been presented against them. Here we have been presenting the case and bringing in evidence, for what purpose, if your Honor is a mere automaton and has no power to say "no prima facie case has been made against these defendants, let them go free" ?

THE COURT: Well, be that as it may, I do not think that that particular feature is of great importance in this case. However, in view of the fact that it has been raised I think, perhaps, the court ought to express its opinion and its interpretation of the statute. In my judgment -- I subscribe, of course, to the experience of counsel for the defense and his interpretation of it -- but in my judgment there could not possibly be any reason for a hearing of this kind other than to give the committing magistrate an opinion upon which he must base his action, to say "in my judgment that evidence

is not sufficiently strong to produce a prima facie case," and the committing magistrate might discharge, because the statute says "before he commit he should be certain." There could not be any other interpretation placed upon it, in my judgment, and if it is necessary, before he commit that he take this testimony. Then there must be some importance given to that testimony in order to help him in his judgment and his determination, but be that as it may, this is an ex parte matter, as I understand, and this examination was for the purpose of satisfying two reasons. The statute says that the state can ask and produce witnesses upon an examination of this kind and commit them to writing for the purpose of having those witnesses on record and for having the record send to the clerk of the court in which the case is going to be tried, and so forth. The only question involved, as I understand it from the very beginning of this hearing, is whether or not the state was in a position to prove such a prima facie case as would justify -- and this court, of course, not passing upon the merits of the case as a trial court might -- but merely passing upon the question of whether or not the state had made out such a prima

facia case as would justify the submission of the evidence in this case to the grand jury. There isn't any question in my mind but what such a case has been made out. This court in its determination to hold to the grand jury, cannot be considered in any way to be passing any personal judgment upon the merits of the evidence that has been introduced. This court cannot be called upon in any way to pass upon, from a personal nature, its belief in the truth or untruth of any of the evidence introduced, but is merely called upon, as I understand it, to pass upon the question of whether or not such a prima facia case has been proved as would justify submission of that evidence to the ends of justice to the grand jury for its consideration. I have followed carefully the evidence in the case as it has been introduced, all of the evidence, and I have also made a careful study of the stenographic copy that has been submitted to me at the end of each session, and I have come to the conclusion in this case that ^a sufficient case has been made out to justify its submission to the grand jury for its action. I have reached the conclusion therefore that these defendants should be committed to await the action of the grand jury.

MR. PFEIFFER: Your Honor, may I have noted on the record my appreciation of the courtesy you have extended to me personally, as a member of the New York Bar, in being permitted to be present here ? It has been a great pleasure, your Honor.

THE COURT: I have been very glad to have you here, Mr. Pfeiffer, and to have had the pleasure of meeting you.

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